Supreme Court, U.S.
FILED
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No. 97-1263

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, *et al.*,

Petitioners,

v.

ROCHAMBEAU WINES AND LIQUORS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS CALIFORNIA WINE CLUB, PASSPORT WINE CLUB, AND WINE CLUB SANTA ANA IN OPPOSITION

ROY C. YOUNG
YOUNG, van ASSENDERP & VARNADOE, P.A.
225 South Adams Street
P.O. Box 1833
Tallahassee, Florida 32302
(904) 222-7206

ROBERT T. WRIGHT, JR.
JONATHAN COHEN *
JEFFREY M. LANDAU
SHUTTS & BOWEN LLP
201 S. Biscayne Blvd.
Miami, Florida 33131
(305) 358-6300
*Counsel of Record

Attorneys for Respondents California Wine Club, Passport Wine Club, and Wine Club Santa Ana.

[ADDITIONAL COUNSEL LISTED INSIDE FRONT COVER]

Washington, D.C. • THIEL PRESS • (202) 326-3286

18 pp

Of Counsel:
JOHN A. HINMAN
HINMAN AND CARMICHAEL
244 California Street
San Francisco, California 94111
(415) 362-1215

QUESTION PRESENTED

Whether there is an implied federal cause of action under the Webb-Kenyon Act, 27 U.S.C. § 122?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Counterstatement of the Case 1

Reasons for Denying the Writ 3

Conclusion 8

TABLE OF AUTHORITIES

Cases

All Brand Importers, Inc. v. Department of Liquor Control,
213 Conn. 184, 567 A.2d 1156 (Conn. 1989) 5

Anheuser-Busch, Inc. v. Dept. of Business Regulation, Division of Alcoholic Beverages and Tobacco,
393 So.2d 1177 (Fla. 1st DCA 1981) 6

Belk-James, Inc. v. Nuzum,
358 So.2d 174 (Fla. 1978) 6

Cort v. Ash, 422 U.S. 66 (1975) 3

Department of Revenue of the State of Florida v. Share International, Inc.,
676 So.2d 1362 (Fla. 1996), *cert. denied*,
117 S.Ct. 685 (1997) 7

Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation v. McKesson Corp., et al.,
524 So.2d 1000 (Fla. 1988), *rev'd on other grounds*,
496 U.S. 18 (1990) 7

Faircloth v. Mr. Boston Distiller Corp., et al.,
245 So.2d 240 (Fla. 1970) 6

Georgia v. Wenger,
94 F. Supp. 976 (E.D. Ill. 1950), *aff'd.*,
187 F.2d 285 (7th Cir. 1951), *cert. denied*,
342 U.S. 822 (1951) 2,4

GMAC v. State, 11 So.2d 482 (Fla. 1943) 6

Guiseppe Pizzeria v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 472 So.2d 1331 (Fla. 3d DCA 1985) .. 6

Ivey v. Bacardi Imports, Inc.,
541 So.2d 1129 (Fla. 1989) 5,7

James B. Beam Distilling Co. v. Dept. of Business Regulation, Division of Alcoholic Beverages and Tobacco,
530 So.2d 450 (Fla. 1st DCA 1988) 6

James B. Beam Distilling Co. v. State,
259 Ga. 363, 382 S.E.2d 95 (Ga. 1989), *reversed*,
501 U.S. 529 (1991), *appeal after remand*,
437 S.E. 2d 782 (1993), *cert. denied*,
513 U.S. 1056 (1994) 5

Layne & Bowler Corp. v. Western Well Works, Inc.,
261 U.S. 387 (1923) 4

Miller Brewing Co. v. Florida Dept. of Business Regulation, Division of Alcoholic Beverages and Tobacco, et al.,
527 So.2d 450 (Fla. 1st DCA 1988) 6

Oregon Liquor Control Comm'n v. Coe,
163 Or. 646, 99 P.2d 29 (Or. 1940) 6

Query v. 206 Cases of Assorted Liquor,
49 F. Supp. 693 (W.D. S.C. 1943) 4

Schieffelin & Co. v. Dept. of Liquor Control,
194 Conn. 165 A.2d 1191 (Conn. 1984) 6

Somerset Importers, Ltd. v. Dept. of Business Regulation, Division of Alcoholic Beverages and Tobacco, et al.,
428 So.2d 679 (Fla. 1st DCA 1983) 6

West Virginia v. Adams Express Co.,
219 F. 794 (4th Cir. 1915) 4

Williams v. Commonwealth,
190 Va. 280, 56 S.E.2d 537 (Va. 1950) 6

Statutes

27 U.S.C. § 121 (Wilson Act) 2

27 U.S.C. § 122 (Webb-Kenyon Act) 1

28 U.S.C. § 1331 1

28 U.S.C. § 1337(a) 1

Fla. Stat. § 561.14 1

Fla. Stat. § 561.54 1

Fla. Stat. § 561.57 1

Chapter 561, Fla. Stat. (Beverage Law: Administration) 6

Chapter 562, Fla. Stat. (Beverage Law: Enforcement) 6

Chapter 563, Fla. Stat. (Beer) 7

Chapter 564, Fla. Stat. (Wine) 7

Chapter 565, Fla. Stat. (Liquor) 7

Chapter 567, Fla. Stat. (Local Option Elections) 7

Chapter 568, Fla. Stat. (Intoxicating Liquors in Counties Where Prohibited) 7

COUNTERSTATEMENT OF THE CASE

Respondents are "wine clubs" located in California who are engaged in the retail sale of wine products and allegedly failed to comply with the State of Florida's "three-tier" alcoholic beverage law and taxation scheme. Contrary to the statements made by Petitioners, Respondents are not "illegal bootleggers" and no court has ever held that their actions violate Florida law.

Florida's "three-tier" scheme provides that alcoholic beverages imported into Florida may be shipped only to an in-state licensed manufacturer or distributor. Fla. Stat. § 561.54. Florida further provides that only licensed vendors physically located in Florida are allowed to sell alcoholic beverages at retail, Fla. Stat. § 561.14, or make deliveries away from their place of business, Fla. Stat. § 561.57.

After establishing a "sting" operation, through which Petitioners allegedly obtained wine shipped by Respondents to state agents in Florida, Petitioners brought the instant action in the United States District Court for the Northern District of Florida. Petitioners filed a five count complaint, exclusively alleging violations of Florida law and seeking both monetary damages and injunctive relief.[1]

Petitioners asserted that subject matter jurisdiction was conferred on the basis of 28 U.S.C. §§ 1331 and 1337(a), based on their allegation that the action arose under "Art. 1, Sec. 8, Cl. 3, United States Constitution

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[1] As noted by the Court of Appeals, four of the five counts sought monetary damages.

("Commerce Clause"); Amend. 21, Sec. 2, United States Constitution, and 27 U.S.C. §§ 121 (the Wilson Act) and 122 (the Webb-Kenyon Act)." Petitioners alleged that their state law claims were before the court based on principles of supplemental jurisdiction. Although Petitioners do not disclose this in their petition to the Court, they have since abandoned their reliance on the Twenty-First Amendment and the Wilson Act as a basis for jurisdiction. *See* Petitioners' Appendix, at v.

On May 3, 1996, the district court dismissed the action for lack of subject matter jurisdiction, holding that neither the Wilson nor Webb-Kenyon Acts, nor the Twenty-First Amendment create a federal cause of action on behalf of Petitioners, but rather, serve as enabling authorities for the States to regulate the flow of alcohol within their borders. As Petitioners had alleged no federal claims in their complaint, the district court therefore dismissed the action.

Petitioners timely appealed to the United States Court of Appeals for the Eleventh Circuit. On October 24, 1997, the Court of Appeals affirmed the decision of the district court. Petitioners' Appendix, at i.

In its opinion, the Court of Appeals examined longstanding precedent of the Seventh Circuit, the only relevant precedent, which held that there was no implied cause of action under the Webb-Kenyon Act. *Georgia v. Wenger*, 94 F. Supp. 976 (E.D. Ill. 1950), *aff'd.*, 187 F. 2d 285 (7th Cir.), *cert. denied*, 342 U.S. 822 (1951). The Court of Appeals found *Georgia v. Wenger* directly "on point." Surprisingly, Petitioners do not cite or discuss *Georgia v. Wenger* in their petition.

In addition to examining *Georgia v. Wenger*, the Court of Appeals applied this Court's precedent,

established in *Cort v. Ash*, 422 U.S. 66 (1975) and its progeny, in order to determine whether there is an implied cause of action under the Webb-Kenyon Act. Petitioners do not cite or discuss *Cort v. Ash* and its progeny either.

The Court of Appeals examined and applied all four factors of the *Cort v. Ash* test, including the legislative history of the relevant statutes and constitutional amendments, before concluding that Petitioners had no implied federal cause of action under the Webb-Kenyon Act. Accordingly, the Court of Appeals affirmed the decision of the district court.

REASONS FOR DENYING THE WRIT

Other than a futile attempt to identify a non-existent conflict, Petitioners have advanced none of the compelling reasons established by this Court for the granting of review upon certiorari.

Petitioners make no attempt to argue that the Court of Appeals did not apply the correct precedent established by this Court in determining whether or not an implied federal cause of action exists under the Webb-Kenyon Act. Petitioners merely state that they "believe that the Court of Appeals did not understand the import of the situation and read too narrowly this Court's private right of action case law...." Petitioners' Brief at 9. Reading a properly stated rule of law "too narrowly" is not a basis for granting certiorari.

Moreover, the Court of Appeals conducted a detailed examination of this Court's precedent and

addressed each of the arguments raised by Petitioners below. Certiorari is not a vehicle for rehearing.[2]

Surprisingly, Petitioners argue that a conflict exists between the circuit courts based upon a eighty-three year-old decision, *West Virginia v. Adams Express Co.*, 219 F. 794 (4th Cir. 1915), that **never discusses the issue**, much less does it hold, that an implied federal cause of action exists under the Webb-Kenyon Act. *Adams Express Co.* has never been cited by any court for this proposition in the past eighty-three years. *Adams Express Co.* is clearly not the "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" required to grant certiorari. *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). In fact, there is no conflict whatsoever.

The Seventh Circuit, in *Georgia v. Wenger*, directly and unambiguously held that a state has no implied federal cause of action under the Webb-Kenyon Act. The Seventh Circuit affirmed the district court which held the same. The only district court ever to address this issue prior to the instant case also has held the same. *Query v. 206 Cases of Assorted Liquor*, 49 F. Supp. 693 (W.D. S.C. 1943). **No court** has ever held the contrary.

For forty-six years *Georgia v. Wenger* was the only appellate precedent. It apparently produced no drastic results as it went unchallenged until now. The Eleventh Circuit has now joined the Seventh Circuit based on this

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[2] Point B of the petition, discussing the power of the States to regulate liquor, was not an issue before the Court of Appeals, and thus is irrelevant to the question presented by this petition. See Petitioners' Brief at 10-19.

Court's modern precedent, producing two appellate opinions with identical results, despite being forty-six years apart. One cannot imagine a more unattractive case for granting certiorari.

Petitioners' remaining reason for granting certiorari, that "the states' ability to regulate the interstate shipment of alcoholic beverages has been greatly undermined by the decisions below," has no basis in fact or law. As the Court of Appeals noted, "[t]he State offers no clear reason why it needs a federal forum," finding that "states have been enforcing their liquor laws against out-of-state distributors in state courts for years."(citations omitted).[3] Petitioners' Appendix, at xix. *See also Ivey v. Bacardi Imports, Inc.*, 541 So.2d 1129 (Fla. 1989); *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E. 2d 95 (Ga. 1989), *reversed*, 501 U.S. 529 (1991), *appeal after remand*, 437 S.E. 2d 782 (1993), *cert. denied*, 513 U.S. 1056 (1994); *All Brand Importers, Inc. v. Department of Liquor Control*, 213 Conn. 184, 567 A.2d 1156 (Conn.

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[3] Respondents object to Petitioners' characterization of the state court proceeding cited at note 1 of the Petition. Petition, at 7 n.1. Petitioners incorrectly state that the state court ruled that it did not have "'personal jurisdiction' over the Respondents." Petition at 9. Respondents are not parties to the state court proceeding. Furthermore, the trial court order in that proceeding demonstrates that it is a straightforward personal jurisdiction case, wholly unrelated to the question presented here. Petitioners' Appendix, at xxxii. In that state court proceeding Petitioners sought to "sting" businesses who, unlike some of their purported customers, simply do not have "minimum contacts" with the State of Florida. It is hard to believe that Petitioners are contending that they are incapable of bringing a proper case in the state courts of Florida in conformity with the 14th Amendment to the United States Constitution.

1989); *Division of Alcoholic Beverages and Tobacco, Department of Business Regulation v. McKesson Corp., et al.*, 524 So.2d 1000 (Fla. 1988), *rev'd on other grounds*, 496 U.S. 18 (1990); *Schieffelin & Co. v. Department of Liquor Control*, 194 Conn. 165, 479 A.2d 1911 (Conn. 1984); *Williams v. Commonwealth*, 190 Va. 280, 56 S.E. 2d 537 (Va. 1949); *Oregon Liquor Control Comm'n v. Coe*, 163 Or. 646, 99 P.2d 29 (Or. 1940); *GMAC v. State*, 11 So.2d 482 (Fla. 1943); *James B. Beam Distilling Co. v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, 530 So. 2d 450 (Fla. 1st DCA 1988); *Miller Brewing Co. v. Florida Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, et al.*, 527 So.2d 891 (Fla. 1st DCA 1988); *Somerset Importers, Ltd. v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 428 So.2d 679 (Fla. 1st DCA 1983); *Anheuser-Busch, Inc. v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, 393 So.2d 1177 (Fla. 1st DCA 1981); *see also Belk-James, Inc. v. Nuzum*, 358 So.2d 174, 176 n.5 (Fla. 1978); *Faircloth v. Mr. Boston Distiller Corp., et al.*, 245 So.2d 240 (Fla. 1970); *Guiseppe Pizzeria v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, 472 So.2d 1331 (Fla. 3d DCA 1985).

One is indeed puzzled by the purported interest of Petitioners in seeking to have the federal courts become the interpreters of the liquor laws of the fifty states, a field traditionally left to the States. There simply is no reason for the Federal courts to assume the burden of overseeing the vast arena of state regulation of alcoholic beverages. *See, e.g.*, Chapter 561, Fla. Stat. (Beverage Law: Administration); Chapter 562, Fla. Stat. (Beverage Law:

Enforcement); Chapter 563, Fla. Stat. (Beer); Chapter 564, Fla. Stat. (Wine); Chapter 565, Fla. Stat. (Liquor); Chapter 567, Fla. Stat. (Local Option Elections); Chapter 568, Fla. Stat. (Intoxicating Liquors in Counties Where Prohibited). As the Court of Appeals noted, and as the cases cited above demonstrate, there is no indication that the States have been unable to pursue their remedies in state courts. Perhaps Petitioners' real concern here is simple forum shopping, since Florida state courts have twice held Florida's Beverage Laws to be unconstitutional and have recently held unconstitutional Florida's attempt to tax goods shipped by mail order. *See Department of Revenue of the State of Florida v. Share International, Inc.*, 676 So.2d 1362 (Fla. 1996), *cert. denied*, 117 S.Ct. 685 (1997); *Ivey v. Bacardi Imports Co.*, 541 So.2d 1129, 1140 (Fla. 1989); *McKesson Corp., supra*, 524 So.2d 1000 (Fla. 1989), *rev'd on other grounds*, 496 U.S. 18 (1990). Such a concern, however, is not a reason for granting certiorari in this case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

ROBERT T. WRIGHT, JR.
JONATHAN COHEN
JEFFREY M. LANDAU
SHUTTS & BOWEN LLP
201 S. Biscayne Blvd.
1500 Miami Center
Miami, Florida 33131
(305) 358-6300

and

ROY C. YOUNG
YOUNG, van ASSENDERP & VARNADOE, P.A.
225 South Adams Street
P.O. Box 1833
Tallahassee, Florida 32302
(904) 222-7206

Attorneys for Respondents California Wine Club, Passport Wine Club, and Wine Club Santa Ana

Of Counsel:
JOHN A. HINMAN
HINMAN AND CARMICHAEL
244 California Street
San Francisco, California 94111
(415) 362-1215